SUPREME COURT, U. S.
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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-248

HERBERT F. KORHOLZ,
Petitioner,

v.

MARY M. DASHO, Executor of the Estate of WILLIAM A. DASHO, Deceased, DASHO-ROGERS, INC., an Illinois corporation, and MAURICE H. SCHY

and

THE SUSQUEHANNA CORPORATION, a Delaware corporation, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS RALPH A.L. BOGAN, EDWARD O. BOSHELL, M.M. HARDIN, J. EARLE MAY, AKSEL NIELSEN, D.W. REEVES, R.C. SCHENK, HAROLD C. STUART AND FRANCIS C. WOOLARD IN OPPOSITION.

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OPINIONS BELOW

The opinion of the District Court, issued September 23, 1974, has not been reported, and is set forth in

Appendix A of the Petition. The Order of the Court of Appeals for the Seventh Circuit, issued May 27, 1975, has not been reported and is set forth in Appendix B of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

The District Court, pursuant to Fed. R. Civ. P. 23.1 approved a settlement as to certain defendants in a protracted stockholders' derivative suit. The settlement provided, among other things, that the settling defendants and their attorneys cooperate with plaintiffs to the extent that the law permits in the further trial of the case. Certain of these attorneys represented Petitioner, a remaining defendant, in earlier stages of the same action and presented a joint defense with the other attorneys involved. Does the Settlement Agreement adequately protect Petitioner's rights, arising out of the earlier stages of the case, against prejudice from performance of the obligations of the settling defendants and their counsel?

STATUTES AND REGULATORY PROVISIONS INVOLVED

Rule 23.1, Federal Rules of Civil Procedure, is set forth at Appendix G of the Petition.

Canons 4 and 9, Code of Professional Responsibility, American Bar Association, are set forth in Appendices E and F of the Petition.

STATEMENT

This derivative action was filed October 22, 1965, against the Susquehanna Corporation and a number of individual defendants, including the Respondents herein. A chronology of the various lower court decisions is set forth in the Petition at pages 3-4.

After the first appeal in this case, *Dasho v. Susquehanna*, 380 F.2d 262 (7th Cir. 1967), *cert. denied*, 389 U.S. 977, the case was tried to the Court, resulting in a judgment in favor of all defendants. *Dasho v. Susquehanna*, CCH Fed. Sec. L. Rep. '69-'70 Transfer Binder, ¶92,575 (N.D. Ill. 1970).

On appeal of that judgment, the Court of Appeals reversed and remanded for a jury trial as to the legal issues, following *Ross v. Bernhard*, 396 U.S. 531, and affirmed as to the equitable issues. *Dasho v. Susquehanna*, 461 F.2d 11, (7th Cir. 1972), *cert. denied*, 408 U.S. 925. (App. C to Petition) From their initial appearance until March 26, 1969, Susquehanna, Petitioner and five of the settling defendants were represented by attorneys in a Chicago firm which had been counsel to Susquehanna prior to the filing of this suit. On March 26, 1969 attorneys in the firm of Rhyne & Rhyne, Washington, D.C. filed their appearance as counsel for those seven defendants, and remained their counsel through the second appeal in 1972. The four other settling defendants were repre-

sented by other counsel until January 12, 1968, at which time attorneys in the Chicago firm of Schiff Hardin & Waite filed appearances on their behalf.

After the remand following the second appeal, Petitioner retained new counsel, and Rhyne & Rhyne no longer represented him. Susquehanna also had retained other counsel in early 1972. (R. 364) Attorneys with Rhyne & Rhyne remained as counsel for five of the settling defendants and attorneys with Schiff Hardin & Waite remained as counsel for the other four, all Respondents herein.

In the first trial herein, begun in September 1969, the defendants presented essentially a common defense, with the various counsel cooperating in a successful effort to defeat all claims of plaintiffs. After the remand based upon the Court of Appeals' ruling with respect to the right of a jury trial on the legal issues, the effort toward a common defense continued. This effort was not affected by the fact that Petitioner had retained new counsel. Counsel for the settling defendants spent time assisting and educating Petitioner's new counsel (R. 152), and Petitioner's counsel voluntarily provided information to counsel for the settling defendants. (R. 76)

As the date for the second trial approached, extensive settlement negotiations resulted in the Stipulation of Compromise and Settlement (the "Agreement") (App. D to Petition) which was presented to the District Court. After notice to stockholders, extended hearings and full briefs, the District Court approved the Agreement with the exception of two paragraphs which were severable by the terms thereof.

Under the terms of the settlement, the action was dismissed as to the nine settling defendants. Petitioner

and two other individuals therefore remain as defendants in the action.

The Agreement provides in Paragraph 5 (App. D10-14 to the Petition), that the settling defendants and their counsel agree to cooperate with Susquehanna (the real party in interest) and plaintiffs in certain respects. The settling defendants agreed to be available for consultation and trial preparation, assisted by counsel, and to be available as witnesses. Counsel agreed to consult in connection with trial preparation, to speak freely and without reservation and to produce relevant documents, pleadings and other materials, including work product. *All these provisions are subject to Paragraph 5(g)*, which provides:

> (g) provided further, however, that nothing contained in subparagraphs a, b, c, d or e of this paragraph 5 shall require or expect any counsel for the Settling Defendants (i) to breach or to permit his client to breach an attorney client obligation which he may have to any Remaining Defendant; (ii) to divulge information or to produce a document which contains the work product of any attorney presently representing a Remaining Defendant or which represents the joint work product or work effort of defense counsel involved in the first trial of this action or in preparation for the second trial of this action upon remand, or (iii) to owe any duty or obligation to Plaintiffs or Susquehanna which are incident to attorney client obligations.

These provisions were drafted with awareness of, and a specific concern for, the ethical and legal obligations of counsel for the settling defendants. (R. 77, 129, 380-381 (offer of proof by Petitioner))

Petitioner objected to the settlement on the grounds that the Agreement "inherently" risked disclosure of Petitioner's confidences, violated the Code of Professional Responsibility, and would prejudice Petitioner on retrial. Petitioner contended that the agreement requires counsel to serve conflicting interests and, essentially, to "represent" plaintiffs and Susquehanna in the lawsuit. (Petitioner's brief in Court of Appeals, 12)

The District Court approved the settlement, stating, in pertinent part:

> The parties to the agreement cannot by their agreement adversely affect the rights of a non-party and they do not purport to do so. Privileged communications are expressly protected by sub-paragraph (g) of the agreement. I cannot assume that the Settling Defendants or their counsel will invade Korholz' attorney-client privilege. (App. A42 to Petition)

On appeal by Petitioner, the Court of Appeals, affirming the District Court, held that the provisions of Paragraph 5(g) of the Agreement:

> adequately protect the appellant against prejudice which may arise by reason of the performance of the obligations of the settling defendants and their counsel, and that to the extent that ambiguity exists and a construction of the terms of the agreement may be necessary in the light of the professional obligations of the attorneys involved, such matters can best be resolved by the district court pursuant to an appropriate application by any affected party. *We are not persuaded that the agreement is invalid on its face or that it raises questions of sufficient importance to justify invalidation of a settlement, which is otherwise invulnerable, of a major aspect of this protracted litigation.* (Emphasis added) (App. B2 to Petition)

ARGUMENT

The issue here is narrow, and no artful stretching, straining or reshaping of the facts can transform it into one of such importance as to warrant review by this Court. We are concerned with one paragraph of a complex, detailed and "otherwise invulnerable" settlement of litigation now ten years old. (Order of Court below, App. B to Petition)

The narrow, and only, issue is whether Paragraph 5(g) preserves Petitioner's confidences and protects those attorney-client privileges which attached in earlier stages of the case. That paragraph was drafted expressly to so protect Petitioner. It has been and continues to be construed by the parties to the agreement in such a manner as to protect Petitioner to the fullest extent of the law, as it continues to develop in this area. Any questions which could possibly arise will, of course, be settled by the District Court.

A three day hearing on the settlement was held in the District Court, during which the attorneys for Respondents, plaintiffs and Susquehanna were examined by Petitioner's counsel. Petitioner did not move to disqualify any attorney, but sought instead to invalidate the Agreement.

The question presented by the Petition has now been answered affirmatively by two courts. The District Court was clearly correct in its judgment, based upon its complete familiarity with the facts and the proper application of the legal principles involved. This case turns upon its unique facts. The purported conflict with decisions of other circuits (Petition, 15) does not exist, and, indeed, there is not even a conflict in principle with other circuits. There is thus no important question of federal law requiring decision by this Court.

I.

THE DECISION BELOW IS CLEARLY CORRECT.

A. Paragraph 5(g) of the Agreement was designed to and does protect Petitioner's rights.

The clear import of the Petition is that the Agreement requires attorneys for the settling defendants to serve conflicting interests. This is manifestly incorrect. Rather, Paragraph 5(g) (App. D 12, to Petition), an essential element of the Agreement, has the sole purpose of limiting the remainder of Paragraph 5 in order to preserve and protect Petitioner's confidences and privileges. The attorneys involved are well aware of their professional responsibilities, and negotiated to arrive at the language, which protects Petitioner in every event. (R. 77, 380) The language of Paragraph 5(g) is necessarily broad in order to encompass all elements of any attorney-client privilege or right, and to avoid any appearance of impropriety. Under it no attorney may breach any such privilege. He may not divulge any information or document containing work product of Petitioner's counsel (or any remaining defendant's counsel). He may not divulge joint work product or work effort. He does not owe any duty or obligation to plaintiffs or Susquehanna. In effect, the extent of cooperation required is limited by Paragraph 5(g) to only that which the law permits.

The clear import of the challenged provisions is to require the attorneys to assist their clients, the settling defendants, in performing their obligations under the Agreement, and in providing information which is

clearly identified as neither privileged nor joint work product.

The attorneys involved herein have not switched sides, as Petitioner seems to insist, and are not engaged in representation of an interest adverse to Petitioner. There has been no evidence or even suggestion of a disclosure of confidences, but only allegations that it "might" happen. Paragraph 5(g), however, fully protects Petitioner's privileges from this eventuality. The Court below was clearly correct in affirming the District Court's approval of the Agreement.

B. The District Court did not abuse its discretion in approving the Agreement.

The District Court is charged with the duty of supervising the conduct of members of the bar, and is thus primarily concerned with any allegation involving professional ethics. *Richardson v. Hamilton International Corp.*, 469 F.2d 1382, 1385 (3d Cir. 1972). And, the regulation of attorneys will be disturbed only when, on review of the record, there has been abuse of permissible discretion. *Id.* at 1386; *Greene v. Singer*, 461 F.2d 242, 243 (3d Cir. 1972), *cert. denied*, 409 U.S. 848.

The District Court here was not only familiar with the background and complexities of the case, it held extensive hearings during which the various attorneys were examined by counsel for Petitioner concerning the Agreement.

In the Court of Appeals, the unanimous panel included Stevens, J., who was also on the panel and wrote the opinion of the Court in the second appeal of

this case. (App. C to Petition). His familiarity with the case, the record and the issues involved is evident. On the record, therefore, there has been no abuse of discretion in the approval of the Agreement.

II.

THERE IS NO CONFLICT OF DECISIONS, EITHER DIRECTLY OR IN PRINCIPLE.

Petitioner asserts a direct conflict between the decision of the Court of Appeals and decisions of other circuits. He does not, however, present any decision which even remotely parallels this case.

The authorities cited by Petitioner share a common factual pattern. An attorney or firm who formerly represented Client A is now representing Client B in litigation against Client A, and the interests of B are clearly adverse to A; *e.g.*, *E.F. Hutton & Co. Inc. v. Brown*, 305 F. Supp. 371 (S.D. Tex. 1969); *Chugach Electric Association v. United States District Court for Dist. of Alaska*, 370 F.2d 441 (9th Cir. 1966); *People v. Gerold*, 265 Ill. 448, 107 N.E. 165 (1914). Or, they are cases in which an attorney for client A later attempts to *become a party* in litigation against Client A, where the subject matter of the attorney's litigation is clearly connected with the subject matter of the earlier representation. *Hull v. Celanese Corp.*, 513 F.2d 568 (2d Cir. 1975); *Richardson v. Hamilton International Corp.*, 469 F.2d 1382 (3rd Cir. 1972).

In *Hull v. Celanese Corp., supra,* the case most heavily relied upon by Petitioner, the issue was "whether a law firm can take on, as a client, a lawyer

for the opposing party in the very litigation against the opposing party." 513 F.2d at 569.

Petitioner has strained in his characterization of the facts of the instant case to bring them within the cited decisions, but to no avail. The differences are obvious and essential. Neither Rhyne & Rhyne nor Schiff Hardin & Waite has overtly or covertly engaged in the representation of an interest adverse to that of a former client, nor have they "switched sides" in the lawsuit. Neither firm owes any obligation or duty to plaintiffs or Susquehanna, nor has either firm:

> "sought to 'prosecute litigation', either as a party, *compare* Richardson v. Hamilton International Corp., 62 F.R.D. 413 (E.D. Pa. 1974), or as counsel for a plaintiff party. *Compare* T.C. Theatre Corporation v. Warner Brothers Pictures, 113 F. Supp. 265 (S.D. N.Y. 1953)." *Meyerhofer v. Empire Fire and Marine Ins. Co.*, 497 F.2d 1190, 1195 (2d Cir. 1974).

Further, the decisions relied upon by Petitioner are materially distinguishable from the instant case for an additional reason. In none of those cases was there the kind of detailed written agreement which exists here, narrowly defining and limiting the responsibilities of counsel. Any concern about "appearances of impropriety" in those cases vanishes in a situation such as the present, where there was hard fought negotiation to define the limits of counsels' future role and where explicit provisions rebut any kind of impropriety. (R. 77, 129; 380-381 (offer of proof by Petitioner))

The principles enunciated by the cases involving attorney-client relationships are thus embodied in the Agreement. The scope of the language of Paragraph 5(g), as construed by the attorneys involved, insofar as

any construction might be necessary, was stated in open court. Attorneys for the settling defendants, plaintiff and Susquehanna have pointed out that, however the law may develop in this area, Paragraph 5(g) is intended to comply with that development. Indeed, it was Respondents who brought the recent decision in *Hull v. Celanese Corp.*, 513 F.2d 568 (2d Cir. 1975) to the attention of the Court of Appeals in oral argument. (The decision had come down after briefs were filed). Respondents' attorneys pointed out that all attorneys involved agreed with the dicta in *Hull*, and therefore, under Paragraph 5(g), the procedure for "cooperation" would be as follows: (i) Any document which attorneys for the settling defendants contemplate giving to plaintiffs or Susquehanna pursuant to Paragraph 5 of the Agreement would be first shown to Petitioner's counsel. If Petitioner's counsel objects to its being shown to plaintiff or Susquehanna, and counsel for the settling defendants agree, then that document will not be shown. If counsel for settling defendants disagree, the Court will be asked to decide the matter, *in camera*, all before plaintiffs or Susquehanna see anything at all; and (ii) neither plaintiffs nor Susquehanna will call upon counsel for consultation, as that might violate the limitations contained in Paragraph 5(g).

The Court of Appeals did not rely upon this representation by attorneys for all parties to the Agreement. Rather, it properly found that Paragraph 5(g) protected petitioner. It did, however, retain the transcript for use by the District Court should a construction of the terms be necessary.* (App. B to

*The Court of Appeals entered an Order on May 27, 1975 authorizing the Clerk to permit any party to copy the transcript of the oral argument in this case (App. B4 to Petition). Respondents have not transcribed the tape.

Petition). In effect, therefore, the issue presented by Petitioner may be moot, since he himself will pass on what may or may not be disclosed. There is no prejudice or appearance of impropriety under these circumstances.

But, regardless of whether the issue is mooted, the case is *sui generis.* The issue is whether Paragraph 5(g) protects Petitioner's privileges. There is no case even remotely bearing upon this issue, or upon these facts. Certainly no conflict of decision exists. By the same token, the strained characterization of the factual situation by Petitioner, in an attempt to bring it within his cited decisions, cannot transform a clearly correct decision in a narrow, unique case into an important question of federal law requiring review by this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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